86-396

Supreme Court, U.S.
FILED
AUG 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

vs.

CLIFFORD ANDERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1.

Whether evidence of defendant's lucid conversation concerning his Miranda rights was properly admitted in rebuttal to counter his defense of insanity based on delusional beliefs resulting in an uncontrollable paranoid rage resulting in two murders.

2.

Whether, if the introduction of such evidence is error, it is harmless error.

3.

Whether this Court's decision in Wainwright v. Greenfield, 106 S. Ct. 634 (1986), should be applied retroactively to reverse the outcome of a trial conducted almost five years earlier.

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II.

ANY ERROR IN THE INTRODUCTION OF DEFENDANT'S VERBAL ASSERTIONS IN THE FACE OF THE MIRANDA WARNINGS WAS HARMLESS.

III.

WAINWRIGHT V. GREENFIELD SHOULD NOT BE APPLIED RETROACTIVELY TO REVERSE THE OUTCOME OF A TRIAL CONDUCTED FIVE YEARS EARLIER.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, which was entered on June 20, 1986.

OPINION BELOW

The opinion of the Supreme Court of Illinois, to be published as People v. Anderson, 113 Ill. 2d 1 (1986), is reproduced in Appendix A to this Petition.

JURISDICTION

The opinion, order and judgment of the Supreme Court of Illinois were entered on June 20, 1986. This Petition for a Writ of Certiorari is filed within 60 days of that date. United States Supreme Court Rule 20(1). The decision of the Illinois Supreme Court was explicitly based on federal constitutional law, in particular on the due process clause of the Fourteenth Amendment and the decision of this Court in Wainwright v. Greenfield, 106 S.Ct. 634 (1986). Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution-Fourteenth Amendment (Section 1)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant Clifford Anderson was charged by indictment with the September 5, 1978 murders of Robert Williams and Mack Sutton, the manager and engineer, respectively, of the building where defendant lived and worked as a janitor. He defended on the ground that he was insane at the time of the murders, claiming that paranoia and a delusional belief that the building he worked in was "going condo" and the building tenants would be harmed triggered an irrational rage so intense that he could not conform his conduct to the requirements of the law. (R. 1359-60, 1681-84) A jury rejected his defense, and in October, 1981, he was found guilty of both murders and thereafter sentenced to death. His conviction was reversed and remanded on June 20, 1986, by the Illinois Supreme Court, which held that the State violated defendant's fourteenth amendment rights by introducing, during the rebuttal portion of the case, evidence of defendant's lucid responses when advised of his Miranda rights 45 minutes after the murders.

At 11:30 a.m. on September 5, 1978, defendant shot Robert Williams and Mack Sutton after speaking with his "union

man," who had been contacted, in the words of defendant's cousin, "to try to get something worked out in reference to the job, whether he was fired or not or what — you know, see if they could save his job." (R. 1577-78) After shooting his victims at different locations on the building premises, defendant walked out of the building, where he was identified to two uniformed Chicago police officers by a witness to one of the shootings. (R. 1429-30) The officers told defendant to stop, but defendant continued to walk toward them with a brown paper bag in his hand. The officers drew their guns and again told defendant to stop, at which point defendant dropped the bag and said, "The gun is in the bag and I shot both of them." (R. 1430)

Defendant's insanity defense centered on his purported delusional belief, as testified to by his room mate and cousin, that the building was "going condo" and that the tenants would be "displaced and made homeless," and on his delusional belief that he was "their savior." (R. 1359, 1574-75) These beliefs allegedly manifested themselves five months prior to the murders, during which time defendant's cousin allegedly wrote 200 to 300 letters on defendant's behalf "to let people know what was going on in the building." (R. 1574-75) However,

no such letters were ever offered into evidence by the defense, and defendant's psychiatric witness testified that a packet of letters he had reviewed in reaching his opinion of defendant's state of mind were written "well after" September 5, 1978. (R. 1673-75)

Defendant's cousin was with defendant on the morning of the murders. He testified that defendant woke him at 6:00 a.m., insisting that he write more letters and make phone calls to various agencies about the building. It appeared to him that defendant had been awake all night. (R. 1575-76) Defendant became "more agitated" as the morning progressed, and began acting "wild and threatening," in a manner his cousin had never seen before. He testified further that defendant was in "a very ill state of mind," "wasn't right," and was "crazy" before defendant left their apartment and shot Robert Williams and Mack Sutton. (R. 1578-82)

A psychiatrist, Dr. Jerome Katz, also testified for the defense. Dr. Katz stated that he interviewed defendant three years after the murders, shortly before trial. Dr. Katz's preliminary diagnosis was that defendant was "extremely emotionally disturbed and possibly psychotic." (R. 1657) His final diagnosis was that defendant was paranoid. (R. 1681) In

Dr. Katz's opinion, defendant suffered from a mental disease as a result of which defendant lacked the substantial capacity to conform his conduct to the requirements of the law, and was therefore insane under Illinois law. (R. 1664-65) See Ill. Rev. Stat. 1981, ch. 38, sec. 6-2(a). On cross-examination by the prosecution, Dr. Katz also stated that in his opinion defendant lacked substantial capacity to appreciate the criminality of his conduct (R. 1666), the other "prong" of the insanity defense in Illinois. Id.

In rebuttal the State of Illinois presented the testimony of one psychiatrist and the stipulated testimony of another, both of whom concluded that defendant was sane on September 5, 1978. (R. 1802-03, 1864)

Chicago Police Officer Ken Reiss also testified for the prosecution in reubttal. He stated that he was present with defendant in a police station at approximately 12:15 p.m. on September 5, 1978, 45 minutes after defendant shot Robert Williams and Mack Sutton. Defendant was advised of his Miranda rights at that time, as to each of which defendant stated that he understood. (R. 1754-55) Defendant then said that he had no more to say and shortly thereafter stated that he wanted a lawyer. (R. 1755-56)

Additionally, Michael Melber testified for the prosecution in rebuttal. On September 5, 1978, he was an Assistant State's Attorney in Cook County. On that day he interviewed defendant at approximately 3:00 p.m. at the same police station. From a pre-printed card Mr. Melber read defendant his Miranda rights, after each of which defendant stated that he understood. (R. 1842) Thereafter, defendant asked Mr. Melber about the condition of the two victims. Mr. Melber replied that, to the best of his knowledge, they were still alive. (Robert Williams died two days later as a result of wounds inflicted by defendant; Mack Sutton died on September 21, 1978. (R. 1489-92)). Defendant then asked for an attorney and questioning ceased. (R. 1842) Following Mr. Melber's testimony the trial court instructed the jury that the testimony was offered solely as evidence of defendant's state of mind, as was done after Officer Reiss testified. (R. 1758-59, 1844)

REASONS FOR GRANTING THE WRIT

I.

UNDER DOYLE V. OHIO AND WAINWRIGHT V. GREENFIELD, EVIDENCE OF DEFENDANT'S LUCID CONVERSATION CONCERNING HIS MIRANDA RIGHTS WAS PROPERLY ADMITTED IN REBUTTAL TO COUNTER HIS DEFENSE OF INSANITY BASED ON DELUSIONAL BELIEFS RESULTING IN AN UNCONTROLLABLE PARANOID RAGE.

The Illinois Supreme Court found reversible error under Wainwright v. Greenfield, 106 S. Ct. 634 (1986), in the admission of testimony in rebuttal and argument concerning defendant's lucid conversation about the scope of his Miranda rights, Miranda v. Arizona, 384 U.S. 436 (1966), with law enforcement officials shortly after the murders. Forty-five minutes after the murders, and again three hours later, defendant stated that he understood each right, had nothing to say, and wanted to talk to a lawyer. (R. 1754-56, 1842) On the latter occasion, he did not request an attorney until after he had asked about the victims' conditions, and was told they were still alive. (R. 1842)

This testimony was introduced in rebuttal after defendant had presented an insanity defense based on his

purported delusional belief that the building in which he lived and had worked as a janitor was "going condo" and that the tenants would be "displaced and made homeless," and on his delusional belief that he was "their savior." (R. 1359, 1574-75) Defendant did not testify at trial, but was described by his cousin and room mate at the time of the murders. On that date, according to defendant's cousin, defendant became "more agitated" as the morning progressed, and began acting "wild and threatening," in a manner his cousin had never seen before. Defendant's cousin further testified that defendant was in "a very ill state of mind," "wasn't right," and was "crazy" before defendant left their apartment and shot Robert Williams and Mack Sutton. (R. 1578-82)

In characterizing defendant's conversation about his rights as "post-Miranda silence" barred under Doyle v. Ohio, 426 U.S. 610 (1976), and Greenfield, the Illinois Supreme Court has substituted a catch phrase for any analysis of the meaning of "post" or "silence," and fails to consider that Miranda necessarily requires some conversation between defendant and the interviewer prior to the exercise of any "post-Miranda" choice. In so doing, the Illinois Supreme Court has ignored the logic of Doyle and Greenfield, and by insulating evidence of

defendant's bizarre behavior from impeachment with contemporaneous evidence of his lucidity and rationality at the time defendant carefully ascertains his constitutional rights, openly invites and perpetuates the fabrication of an insanity defense. The Court has taken a slice out of time — leaving for the jury's consideration the instances of defendant's aberrant behavior (the murders themselves) and defendant's purported delusions at the time (none of which were corroborated beyond the testimony of defendant's cousin), but precluding knowledge of defendant's capability for rational and appropriate social interaction. Defendant cannot have it both ways — proceeding in parallel as a crazed paranoiac motivated by delusions placed of record, and as a sane defendant whose capacity for rational decision-making remains forever off the record.

This is particularly problematic in such a case as this. Defendant's statements — that he understood his rights, would say nothing more, and wanted a lawyer — are not insolubly ambiguous, but instead show, without regard to his guilt or innocence as to the conduct charged, that he realized he was in a setting where he faced potentially serious consequences stemming from a confrontation with law enforcement officials and therefore chose to remain silent and

to see an attorney. Defendant therefore had the capacity to appreciate the possibility of dire (i.e., criminal) consequences based solely upon what he said to police, a state of mind remarkably similar to the capacity to appreciate the criminality of his conduct less than one hour earlier when he shot his victims, which in turn the State of Illinois was bound to prove beyond a reasonable doubt once defendant raised the insanity defense. Ill. Rev. Stat. (1981) ch. 38, par. 6-2(a). "As to the subject matter of his statements" — here, that defendant understood the Miranda warnings given to him — "the defendant has not remained silent at all," and Doyle is therefore inapplicable. Anderson v. Charles, 447 U.S. 404, 408 (1980).

Per Greenfield, "post-Miranda warnings silence" includes "the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." 106 S. Ct. at 640-41 n. 13. The obvious distinction from Greenfield here, however, is that this evidence was introduced in rebuttal, only after defendant had raised the insanity defense, and only as evidence of defendant's state of mind at the time per the trial judge's limiting instruction to the jury. (R. 1759, 1844) Consequently, this "breach" of the promises implicit in the Miranda warnings was not used here to

obtain defendant's conviction; it was instead offered to forestall defendant's fraudulent claim of insanity due to delusional paranoia and thereby preclude a verdict of insanity when the existence of this evidence tends to indicate defendant's sanity. "It does not follow from Miranda that evidence inadmissible in the prosecution's case-in-chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." Harris v. New York, 401 U.S. 222, 224 (1971). See also Oregon v. Hass, 420 U.S. 714, 722 (1975) ("We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution.")

Accordingly, just as defendant could not be allowed under Harris and Hass to perjure himself and then hide behind the fifth amendment, he should not be allowed to establish a prima facie case of insanity without affording the State an opportunity to challenge the veracity of the evidence upon which his defense rests. To the extent that Greenfield establishes a quasi-contractual rule of estoppel emanating from the due process clause, the State should be estopped from breaching any of its promises, implicit or otherwise, only for so

long as the defendant similarly proceeds in good faith. Once he attempts to present a fraudulent defense, however, binding the State in such a manner serves no constitutional goal but only operates to obfuscate the truth and impede the goal of affording both parties a fair trial.

In the case at bar, defendant was given the Miranda warnings in an interview that was an absolute model of the proper application of the Miranda decision--and defendant has never contended otherwise. The State of Illinois urges this Court to reverse the decision of the Illinois Supreme Court holding that defendant was deprived of a fair trial when the State introduced evidence of defendant's rational comprehension of those Miranda warnings to rebut defendant's evidence of his irrationality at the time he murdered his victims. While there are indeed situations in which the truth-seeking function of a trial is properly sacrificed for the sake of some greater goal (as, in the Fourth Amendment context, deterring police conduct which itself offends the Constitution), this is not one of them. It hardly offends civilized notions of a fair trial for defendant to be caught out in the fabrication of an insanity defense. We have gone far afield indeed from the due process clause it if is construed to require

the State's facilitation of an insanity defense free from impeachment by probative evidence obtained without coercion and in full compliance with all of this Court's requirements governing custodial interrogation.

II.

ANY ERROR IN THE INTRODUCTION OF DEFENDANT'S VERBAL ASSERTIONS IN THE FACE OF THE MIRANDA WARNINGS WAS HARMLESS.

Assuming that the State's rebuttal use of defendant's lucid responses in the face of the Miranda warnings is error under Wainwright v. Greenfield, 106 S. Ct. 634 (1986), the State urges that any error be held harmless.

The Illinois Supreme Court held that the error ascribed by it was not harmless "given the sharp disagreement of the expert witnesses on the question" of sanity. Additionally, the Court rejected the State's argument that introduction of this evidence was harmless since it was only offered to prove that defendant had the capacity to appreciate the criminality of his conduct, whereas the sole thrust of the defense was that defendant did not have the capacity to conform his conduct to the requirements of the law. (Under Illinois law, once the defense was raised it was incumbent upon the State to prove beyond a reasonable doubt that defendant had substantial capacity both to conform his conduct to the requirements of the law and to appreciate the criminality of his

conduct. Ill. Rev. Stat. 1981, ch. 38, sec. 6-2(a)). In so holding the Illinois Supreme Court ignored considerable lay evidence proving defendant's sanity and erred in rejecting the State's harmless error analysis.

Although this Court has yet to be presented with the question, it has gone out of its way to indicate that violations of Doyle are potentially harmless. Doyle itself concluded with the statement that the "State has not claimed" that the use of post-Miranda silence for purposes of impeachment "in the circumstances of this case might have been harmless error. Accordingly, petitioner's convictions are reversed. . . ." 426 U.S. 610, 620-21 (1976). In Greenfield, the Court noted that the Florida Attorney General did not argue that any error was harmless, thus indicating, at least implicitly, that the argument was available and that a per se rule would not be applied. 106 S. Ct. at 640-41 n. 8.

In its short discussion of the harmless error issue, the Illinois Supreme Court overlooked considerable other evidence which proved defendant sane beyond a reasonable doubt, besides the contradictory psychiatric expert evidence. Indeed, the Court's sole reliance on this latter evidence as a basis to reject the State's harmless error argument does nothing

to further a proper resolution of the harmless error issue because each party will assuredly present contrary psychiatric expert evidence in virtually every insanity case. Under such an analysis, any error, however slight, in a case where sanity is at issue can never be deemed harmless because "sharp disagreement of the expert witnesses on the question" of sanity will be present in every case. Such a de facto per se rule is anathema to the proper administration of criminal justice, particularly where other evidence proved defendant sane beyond a reasonable doubt without reliance on defendant's conversations as to his Miranda rights.

Contrary to defendant's unsupported claim that he was motivated by delusional beliefs as to injustices perpetrated on building tenants and was incapable of conforming his conduct to the requirements of the law, other evidence proved that defendant killed simply to exact revenge after being fired. That he had been fired shortly before he killed his victims was established by the testimony of his cousin and roommate at the time (R. 1575-79), and was admitted by defendant's attorney during his opening statement to the jury. (R. 1360) Defendant took no steps to kill his victims till after he spoke with a union representative. His capacity to conform his conduct was

further established by his failure to attempt to harm another member of the building's management who was present in the same room when one victim was shot, but who would not have been involved in the firing of defendant as she had just returned from a 10-day vacation. (R. 489, 1712) Clearly, defendant was not motivated by any delusional beliefs, but purposely and intentionally killed his victims for a specific reason grounded in reality. Indeed, defendant went so far as to tell one witness shortly after his arrest: "I could have shot you, but I didn't want to." (R. 1431) More conclusive evidence of a capacity to conform to the requirements of the law is difficult to envision.

Moreover, defendant's verbal assertions of his Miranda rights constitute "evidence of his ability to distinguish right from wrong" and his capacity to appreciate the criminality of his conduct, as those assertions show he had the similar capacity to appreciate the possibility of dire consequences stemming from statements to police in a post-arrest confrontation. See Greenfield, 106 S. Ct. at 642 (Rehnquist, J., dissenting). Consequently, any unfairness can only be said to have prejudiced that aspect of defendant's insanity defense. His defense, however, centered solely on his purported inability to conform his conduct to the requirements

of the law. Any error therefore did not contribute to his conviction and must be deemed harmless.

This is particularly true where defendant made a pre-Miranda incriminating statement to police: "The gun is in the bag and I just shot both of them." (R. 1429-30) The central function of the Miranda warnings is to effectuate the fifth amendment right against self-incrimination; Doyle and Greenfield operate to proscribe "punishment" for the exercise of that right which may have been induced by those warnings. Those considerations, however, further no constitutional goal in a case such as this where defendant's subsequent, post-Miranda exercise of his right against self-incrimination is essentially irrelevant and has no constitutional significance in the face of his pre-Miranda admission of guilt and waiver of the right against self-incrimination. Without such constitutional significance, any violation of Doyle and Greenfield is harmless.

Finally, introduction of this evidence in the prosecution's case-in-chief in Greenfield was perhaps "especially egregious because, unlike Doyle, there was no risk 'that exclusion of the evidence (would) merely provide a shield for perjury.' " 106 S. Ct. at 639 n. 8. Conversely, its introduction in rebuttal only after defendant presented his

defense in this case must necessarily be less egregious if erroneous, a factor thoroughly unexamined by the Illinois Supreme Court in its dispatch of the State's harmless error argument.

As to the standard for determining whether a Doyle error is harmless, the question was not considered by the Illinois Supreme Court, and no case has yet required this Court to decide the matter. A related question is presented in a petition for writ of certiorari now pending in another Illinois case, State of Illinois v. Charles Miller. See United States ex rel. Miller v. Greer, 789 F. 2d. 438 (7th Cir. 1986) (en banc). In Miller--as in the original Doyle decision--post-Miranda silence was introduced to impeach a later exculpatory statement. For purposes of the petition for writ of certiorari, the State of Illinois concedes a Doyle violation in Miller, but questions whether the standard for harmless error on collateral review of a habeas corpus petition should be the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967), or the less stringent standard identified in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), for violations of rights not specifically enumerated in the Bill of Rights.

Given the evidence in this case, the State believes that the question of the applicable standard need not be reached; any Greenfield violation is harmless even if the "beyond a reasonable doubt" standard of Chapman is applied. The State does, however, believe that for the reasons set forth in Judge Easterbrook's dissent in Miller, 789 F.2d at 448, the Donnelly v. DeChristoforo, 416 U.S. 637 (1974), standard is more appropriate for any violation of Wainwright v. Greenfield, 106 S.Ct. 634 (1986)—a decision extending Doyle v. Ohio, which states a procedural rule designed to effectuate Miranda v. Arizona, 384 U.S. 436 (1966), which is in turn a prophylatic rule designed to protect a constitutional right.

III.

WAINWRIGHT V. GREENFIELD SHOULD NOT BE APPLIED RETROACTIVELY TO REVERSE THE OUTCOME OF A TRIAL CONDUCTED FIVE YEARS EARLIER.

If this Court indeed meant to promulgate the broad expansion of Miranda v. Arizona, 384 U.S. 436 (1966), and Doyle v. Ohio, 426 U.S. 610 (1976), perceived by the Illinois Supreme Court, then Greenfield becomes not merely another incrimental extension of the permutations of Doyle, but a clear break with prior precedent. The State therefore urges this Court to give only prospective effect to the Greenfield decision.

In Solem v. Stumes, 465 U.S. 638, 104 S. Ct. 1338 (1984), (a habeas corpus case holding that Edwards v. Arizona, 451 U.S. 477 (1981), was not to be applied retroactively), the Supreme Court listed the criteria to be applied in determining the issue of retroactivity as "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 104 S. Ct. at 1341, quoting Stovall v. Denno, 388 U.S. 293 (1967). Each of these factors militates against retroactive application of Greenfield.

First "complete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." 104 S. Ct. at 1342. The "accuracy" to be enhanced is the ultimate result of the trial, and the goal of retroactive application is "to correct serious flaws in the fact-finding process" in order to reduce "the clear danger of convicting the innocent." Stovall, 388 U.S. at 298. Retroactive application, then, is most appropriate in those instances where evidence subsequently found to be constitutionally infirm is offered at trial to prove a defendant guilty, when in fact the unconstitutional procurement or presentation of that evidence may more likely affect the truth-finding process and increase the danger of convicting the innocent.

In this case, on the other hand, the issue is the admissibility of evidence which was properly obtained. The character of that evidence — that defendant was given the Miranda warnings and answered affirmatively when asked if he understood those warnings, and, additionally, shortly thereafter requested an attorney — is not contested, nor is it susceptible to any possible distortion because of police misconduct, which is not alleged here. In fact, the recitation of defendant's rights

was an absolute model of the proper application of the Miranda decision; defendant has never contended otherwise. If the Illinois Supreme Court is correct in its interpretation of Greenfield, this evidence prejudices defendant because the violation of the implied assurances Miranda warnings carry essentially operates to compel defendant to offer evidence against himself. This "compulsion," however, is not coercive; indeed, the proper application of Miranda here has the opposite effect and cannot be said to taint the legitimacy of such evidence. Cf. Shea v. Louisiana, 105 S. Ct. 1065 (1985). It must therefore be concluded that its introduction does nothing to distort the fact-finding process or alter the ultimate determination of defendant's guilt or sanity.

The second factor to be considered is the state of the law at the time the now-objectionable conduct occurred. Here, the relevant time is October, 1981, when defendant's trial was conducted because, of course, the alleged error is the introduction of the evidence, not its procurement on September 5, 1978, the date of the murders. The only apparent authority as of October, 1981, was People v. Muskgrove, 44 Ill. App. 3d 381, 358 N.E.2d 336 (3d Dist. 1976), and United States v. Trujillo, 579 F. 2d 285 (10th Cir. 1978), both of which supported

the admissibility of the evidence in question on the ground that it had probative value, otherwise lacking in a Doyle-type case, where the defense of insanity is raised. The State's decision to offer this evidence and the trial court's decision to admit it can scarcely be characterized as a failure to anticipate an issue whose resolution was clearly foreshadowed. Greenfield establishes a "bright line" rule, and the trial judge cannot be faulted if he did not anticipate its per se approach. See Solem, 104 S. Ct. at 1343 ("Authorities are generally entitled to rely on existing case law").

Third, this Court must consider the effect of retroactivity on the administration of justice. In contrast to the many cases likely affected by retroactive application of Edwards v. Arizona, (see Solem, 104 S. Ct. at 1345), there are probably less cases in which a defendant's conduct during recitation of the Miranda warnings has been used to rebut the defense of insanity. (While the State has no statistics to offer, Greenfield has already been relied upon by the Illinois Supreme Court to affirm a reversal of a murder conviction by the Illinois Appellate Court, which is presently before this Court on writ of certiorari. People v. Stack, 112 Ill. 2d 301, 493 N.E.2d 339 (1986)). However, in such cases a retrial may be especially

difficult. Sanity is not susceptible to direct proof; such cases depend upon witness observation of defendant at the time in question and are vulnerable to problems of faulty memory and missing witnesses when retrial is required after a long delay. At this time, almost eight years have elapsed since defendant shot and killed Robert Williams and Mack Sutton.

The Illinois Supreme Court's holding that Greenfield is to be applied retroactively is therefore erroneous. Introduction of this evidence did nothing to distort the fact-finding process, and existing case law supported its introduction at the time of trial five years ago. To require the retrial of defendant now, eight years after these double murders, raises the possibility that a guilty man may be found innocent, the precise opposite of the result which retroactivity is designed to effectuate.

CONCLUSION

For all the foregoing reasons, the State of Illinois respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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Docket No. 56043-Agenda 1-November 1985.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,
v. CLIFFORD ANDERSON, Appellant.

JUSTICE SIMON delivered the opinion of the court:

On September 5, 1978, the defendant, Clifford Anderson, shot and killed the manager and the engineer of the apartment building where he lived and was employed as a janitor. He was indicted on two counts of murder and two counts of armed violence. At trial he defended on the ground of insanity. His first trial in the circuit court of Cook County ended in a mistrial when the jury could not reach a verdict. Ten days later the defendant was tried a second time and found guilty on all counts. After a bifurcated sentencing hearing, the jury sentenced him to death. The case is before us on direct appeal (87 Ill. 2d R. 603).

The defendant concedes that the only material issue at trial was his sanity, and thus an extended discussion of the facts is unnecessary. To establish his defense, the defendant called a psychiatrist, his roommate, and his sister. The psychiatrist had interviewed Anderson and reviewed various psychiatric and criminal records, as well as letters written by or at the direction of Anderson. In response to a hypothetical question, the expert testified that the defendant could not

conform his conduct to the requirements of the law at the time of the shootings. On cross-examination he stated that the defendant probably was unable to appreciate the criminality of his acts.

The defendant's roommate and cousin, Ora Russell, related that Anderson had been concerned for months that the building was "going condo" and that Anderson had him write two or three hundred letters to various agencies complaining about what Anderson perceived was happening. Anderson was apparently fired from his job on September 2. Anderson woke Russell up at 6 a.m. on the morning of September 5 and appeared not to have slept. At Anderson's request, Russell wrote letters and made phone calls to a government agency, the news media, and a union. After speaking to the union, defendant seized a gun and went out. The shootings followed. Russell said he though Anderson was "crazy" and described his behavior on the day of the killings as "wild."

Anderson's sister testified to a history of mental illness in the family. She also identified certified commitment papers on the defendant's mother and brother.

In rebuttal the State presented its own psychiatric expert, who concluded that Anderson was legally sane. By

stipulation, a written statement of another psychiatrist who believed that the defendant was sane was also introduced. In addition, the prosecution elicited testimony from three building residents who witnessed some of the events of September 5 and said that they had never noticed anything unusual about Anderson or seen him in a rage. The arresting police officer and an assistant State's attorney who interviewed the defendant on the day of the shootings both stated that Anderson appeared normal.

The defendant raises some 35 issues on this appeal concerning his convictions and the sentence of death which was imposed. We need only address two of these.

The defendant contends that he was denied a fair trial when the State introduced evidence of his responses to Miranda warnings to establish his sanity. Officer Ken Riess testified that, shortly after the defendant arrived at the lockup, his partner read the Miranda warnings to the defendant and the defendant replied that "he understood and that he had no more to say to us." The officer stated that Anderson subsequently requested a lawyer. The evidence was admitted over defense objection, and the trial judge instructed the jury that it could only be used "for the limited purpose of considering the state of

mind, the ability to comprehend, to understand what his mental condition was."

Assistant State's Attorney Michael Melber testified that when he read Anderson his rights later in the day, the defendant said that he understood the rights and, after inquiring about the condition of the victims, again asked for an attorney. The judge reiterated that the evidence could be used in a "limited fashion only as bearing upon the issue of the defendant's mental condition." In both initial and rebuttal closing arguments, the prosecution emphasized that the defendant's responses to the Miranda warnings showed his "ability to appreciate the criminality of his act and to conform his conduct to the law."

This case is controlled by our recent decision in People v. Stack (1986), 112 Ill. 2d 301. In Stack, the prosecution sought to disprove a claim of insanity by showing that the defendant was lucid enough to invoke his privilege against self-incrimination shortly after the incident. This court, following a decision by the United States Supreme Court on the identical issue (Wainwright v. Greenfield (1986), 474 U.S. ___, 88 L. Ed. 2d 623, 106 S. Ct. 634), held that the introduction of such evidence breached the promise implicit in

the Miranda warnings that the exercise of the fifth amendment privilege would not be used against the defendant and thus deprived him of a fair trial. The court also determined in Stack that the rule applied in Greenfield should be given retroactive effect. 112 Ill. 2d 301.

The State asserts that any error in admitting testimony concerning the defendant's responses to the Miranda warnings was harmless because it was offered only to establish that the defendant was able to appreciate the criminality of his conduct. According to the State, the evidence worked no prejudice since the defense (in its view) was based solely on the other prong of the insanity test, the inability of the accused to conform his conduct to the requirements of the law (Ill. Rev. Stat. 1983, ch. 38, par. 6-2).

Even assuming the State's unsupported thesis that the responses did tend to prove that the defendant appreciated the criminality of his conduct but did not bear on the ability to conform, the State's argument fails here. The prosecution explicitly told the jury that the evidence established the defendant's sanity under both prongs of the insanity defense, and this argument was consistent with the judge's admonitions. The State cannot now maintain that the jury ignored the advice

and disregarded the evidence. The State's additional argument that the error was harmless because the other evidence of sanity was overwhelming is without merit given the sharp disagreement of the expert witnesses on the question. The defendant's convictions must therefore be reversed and the cause remanded for a new trial.

A further question which arose at both of the defendant's previous trials, and which is likely to recur at a new trial, is to what extent the defendant's expert witness could disclose to the jury the basis for his diagnosis. Specifically, the defendant challenges the judge's ruling that his psychiatric expert could not reveal facts or opinions contained in reports upon which he relied in making his diagnosis. The defendant also argues that the court was incorrect in preventing the psychiatrist from recounting specific statements made by the defendant to him. Because these questions are of importance to the proper consideration of the insanity defense, we proceed to address them in turn.

The trial judge refused to allow any disclosure of the contents of the reports upon which the defendant's expert witness, Dr. Jerome Katz, relied in forming his opinion. These reports included evaluations by psychatrists, doctors, and

counselors made while Anderson was in the army and while he was incarcerated in California, reports by the State's psychiatric experts, and information relating to a previous criminal offense. Dr. Katz was allowed only to state that he utilized these reports.

After this court's decisions in People v. Ward (1975), 61 Ill. 2d 559, and Wilson v. Clark (1981), 84 Ill. 2d 186, it is undisputed that even though reports made by others may be substantively inadmissible, an expert may utilize them in forming his opinion as long as experts in the field reasonably rely on such materials. Nor is there any question that the psychiatric profession reasonably and customarily relies on records of the kind at issue here; both Dr. Katz and the State's expert, Dr. Gerson Kaplan, testified that a patient's psychiatric history is one of the most important criteria in making a diagnosis. (See also United States v. Lawson (7th Cir. 1981), 653 F.2d 299, 302 (taking judicial notice that psychiatrists customarily rely upon other psychiatric and investigative reports).) The only question is whether the rationale of Ward and Wilson also allows the psychiatric expert to explain the basis of his opinion by referring to relevant matters in the reports.

At issue in Ward was a diagnosis by the prosecution's psychiatric expert which was grounded in a personal interview with the accused as well as a review of other reports, including evaluations by another psychiatrist and a psychologist. In addition to stating his opinion that the defendant was sane, the doctor disclosed the findings of some of the secondhand sources. This court, relying on Rule 703 of the Federal Rules of Evidence (Fed. R. Evid. 703), held that expert medical opinion on the question of sanity based in part on records compiled by others which had not been admitted into evidence was permissible if the reports "are of a type customarily utilized by the medical profession." People v. Ward (1975), 61 Ill. 2d 559, 568.

The State correctly notes that Ward did not explicitly hold that it was proper for the psychiatrist to reveal the contents of the reports he relied upon in arriving at his diagnosis. The majority of appellate cases following Ward, however, have interpreted it as implicitly deciding that the underlying facts and opinions could be disclosed. See Henry v. Brenner (1985), 138 Ill. App. 3d 609; People v. Castro (1983), 113 Ill. App. 3d 265; In re Germich (1981), 103 Ill. App. 3d 626, and cases cited therein; but see People v. Clemons (1979), 72 Ill. App. 3d 860.

The defendant points to Ward and the appellate court decisions for support, and adds that this court's opinion in Wilson v. Clark (1981), 84 Ill. 2d 186, clarifies that expert witnesses may disclose the contents of otherwise inadmissible materials upon which they reasonably rely. In Wilson, the court prospectively adopted Rules 703 and 705 of the Federal Rules of Evidence to govern all cases involving expert testimony. Rule 703 provides:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Fed. R. Evid. 703.

Rule 705 states:

> "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless

> the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Fed. R. Evid. 705.

Rule 705, which was enacted to eliminate the necessity for the hypothetical question and to place the burden for eliciting the facts upon which an expert opinion is based on the cross-examiner (Wilson v. Clark (1981), 84 Ill. 2d 186, 194-95), does not clearly answer whether such facts may be brought out on direct examination. Nor does Rule 703 by its terms resolve this issue. However, in our judgment the logic underlying Rule 703 and this court's decisions in Ward and Wilson compels the conclusion that an expert should be allowed to reveal the contents of materials upon which he reasonably relies in order to explain the basis of his opinion.

Rule 703 was designed to "'broaden the basis for expert opinions *** and to bring the judicial practice into line with the practice of the experts themselves when not in court.'" (People v. Ward (1975), 61 Ill. 2d 559, 567, quoting Advisory Committee Note to Rule 703.) The rule thus expands the range of information available, at least indirectly, to the trier of fact. Inasmuch as the opinion based on these materials-which

are deemed trustworthy by the profession-is allowed, it would be both illogical and anomalous to deprive the jury of the reasons supporting that opinion.

This conclusion accords with the overwhelming weight of authority from other jurisdictions as well as a great deal of persuasive scholarly commentary. See Paddack v. Dave Christensen, Inc. (9th Cir. 1984), 745 F.2d 1254; United States v. Ramos (11th Cir. 1984), 725 F.2d 1322; American Universal Insurance Co. v. Falzone (1st Cir. 1981), 644 F.2d 65; United States v. Madrid (10th Cir. 1982), 673 F.2d 1114; United States v. Harper (5th Cir. 1971), 450 F.2d 1032; United States v. Sims (9th Cir. 1975), 514 F.2d 147; O'Gee v. Dobbs Houses, Inc. (2nd Cir. 1978), 570 F.2d 1084; Brown Mechanical Contractors Inc. v. Centennial Insurance Co. (Ala 1983), 431 So. 2d 932; People v. Stone (1974), 35 N.E.2d 69, 315 N.E.2d 787, 358 N.Y.S.2d 737; State v. Myers (1976), 159 W. Va. 353, 222 S.E.2d 300; E. Cleary & M. Grahanm, Illinois Evidence sec. 703.1, at 473, 493 (4th ed. 1984); Rothstein, Rules of Evidence for the United States Courts and Magistrates 289 (2d ed. 1985); Saltzburg and Redden, Federal Rules of Evidence Manual 671 (4th ed. 1986); ABA Section of Litigation, Emerging Problems Under the Federal Rules of Evidence 209, 214-15; Diamond and Louisell,

the Psychiatrist as an Expert Witness: Some Ruminations and Speculations, 63 Mich. L. Rev. 1335, 1353-54 (1965); Dieden and Gasparich, Psychiatric Evidence and Full Disclosure in the Criminal Trial, 52 Calif. L. Rev. 543, 544 (1964).

To prevent the expert from referring to the contents of materials upon which he relied in arriving at his conclusion "places an unreal stricture on him and compels him to be not only less than frank with the jury but also *** to appear to base his diagnosis upon reasons which are flimsy and inconclusive when in fact they may not be." (State v. Myers (1976), 159 W. Va. 353, 358, 222 S.E.2d 300, 304.) Absent a full explanation of the expert's reasons, including underlying facts and opinions, the jury has no way of evaluating the expert testimony (State v. Allison (1983), 307 N.C. 411, 298 S.E.2d 365) and is therefore faced with a "meaningless conclusion" by the witness (State v. Griffin (1965), 99 Ariz. 43, 49, 406 P.2d 397, 401).

We reject the State's suggestion that the jury was adequately apprised of the basis of Dr. Katz' opinion because he identified the sources of the reports. The mere fact that the doctor utilized specified background material did not tell the jury "which opinions he credited, which he rejected, and why."

(See United States v. Harper (5th Cir. 1971), 450 F.2d 1032, 1037.) As the court in Harper aptly stated:

> "In a case such as this, in which expert witnesses express different conclusions as to the defendant's mental condition at the time of the alleged offense, it is important that the jury know upon what facts the expert witness based his conclusion. As we have said on several occasions, 'expert opinion as to insanity rises no higher than the reasons upon which it is based.'" 450 F.2d 1032, 1037.

The trial court ruled, and the State maintains here, that the information in the records utilized by Dr. Katz constitutes inadmissible hearsay and that Rule 703 was not intended to create an exception to the hearsay rule. Of course, by even allowing an expert to consider such materials in forming an opinion they are indirectly brought before the jury. More fundamentally, however, the State's argument misapprehends the hearsay rule. Hearsay is an extrajudicial statement offered in court "to show the truth of the matters asserted." (People v. Carpenter (1963), 28 Ill. 2d 116, 121.)

Although the contents of the reports relied upon by Dr. Katz would clearly be inadmissible if offered for their truth, the defense seeks to allow the expert to disclose the underlying facts and conclusions not for their truth but for the limited purpose of explaining the basis for the expert witness' opinion. For this limited purpose the statements do not constitute hearsay, and can therefore be allowed. See, e.g., Paddack v. Dave Christensen, Inc. (9th Cir. 1984), 745 F.2d 1254, 1262; United States v. Ramos (11th Cir. 1984), 725 F.2d 1322.

It is true that an uninformed jury could misuse this type of information as substantive proof of insanity. We do not believe that this possibility is a sufficient reason to deny the jury an adequate basis for assessing the weight and credibility of expert opinion. A limiting instruction advising the jury to consider the underlying statements only to evaluate the basis of the expert's opinion, should forestall any such misuse. (United States v. Harper (5th Cir. 1971), 450 F.2d 1032, 1037; Brown Mechanical Contractors, Inc. v. Centennial Insurance Co. (Ala 1983), 431 So. 2d 932, 944; Saltzburg and Redden, Federal Rules of Evidence Manual 671 (4th ed. 1986).) A trial judge, of course, need not allow the expert to recite secondhand information when its probative value in explaining the expert's

opinion pales beside its likely prejudicial impact or its tendency to create confusion.

The final question to be addressed, which was expressly left open in People v. Gacy (1984), 103 Ill. 2d 1, 71, is whether a psychiatric expert may be precluded from relating statements made to him by the defendant which figure in his diagnosis. Because, as Dr. Katz testified, psychiatrists customarily rely on statements made by a patient in forming a diagnosis (Diamond and Louisell, The Psychiatrist as an Expert Witness: Some Ruminations and Speculations, 63 Mich. L. Rev. 1335, 1350 (1965); Dieden and Gasparich, Psychiatric Evidence and Full Disclosure in the Criminal Trial, 52 Calif. L. Rev. 543, 550), an expert must be allowed to repeat those statements if relevant to explaining the opinion to the jury (State v. Myers (1976), 159 W. Va. 353, 222 S.E.2d 300; State v. Allison (1983), 307 N.C. 411, 298 S.Ed.2d 365).

The State argues that this court should continue to hew to the line recognized in People v. Hester (1968), 39 Ill. 2d 489, which held that a nontreating expert physician, unlike a treating expert, could not give an opinion based upon statements made to him by the accused because of the self-serving nature of the statements. In view of this court's later

conclusion in Wilson v. Clark (1981), 84 Ill. 2d 186, that Rule 703 makes no distinction between treating and nontreating physicians and that either may express an opinion founded on any information reasonably relied upon by experts in the field, the State's argument has already been rejected. To the extent that a savvy defendant's statements tending to show mental illness might be consciously self-serving, this possibility can adequately be brought out on cross-examination of the expert.

The convictions are reversed and cause remanded for a new trial.

Reversed and remanded.

EDITOR'S NOTE:

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No. 86-396

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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SUPREME COURT, U.S.

STATE OF ILLINOIS,

Petitioner,

vs.

CLIFFORD ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Illinois Supreme Court was correct in applying this Court's recent decision in Wainwright v. Greenfield to a case which is factually on all fours with Greenfield.

2. Whether the Illinois Supreme Court properly held that the errors in the admission of respondent's post-Miranda warnings silence on two occasions as substantive evidence of his sanity and thus of his guilt and prosecutorial argument thereon were not harmless.

3. Whether this Court's decision in Wainwright v. Greenfield should be applied retroactively to a case not yet final at the time of the Greenfield decision where Greenfield established no new constitutional principle or rule but simply applied the well-settled principles of Doyle v. Ohio to the facts of that case.

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No. 86-396

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF ILLINOIS,

Petitioner,

vs.

CLIFFORD ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Illinois, reversing the respondent's convictions and remanding the cause for a new trial, was issued on June 20, 1986, and is reported at 113 Ill. 2d 1, 495 N.E.2d 485 (1986).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1257(3). However, as discussed in full below, petitioner, who seeks to relitigate this Court's holding in a case decided earlier this year which established no new constitutional principle, and who also asks this Court to review a purely factual question which was thoroughly and properly addressed by the Supreme Court of Illinois, has failed to present any ground warranting a grant of certiorari.

STATEMENT OF THE CASE

The Statement of the Case presented by the petitioner essentially sets forth a fair account of the material facts in this case. (Petition at 5-9) However, there are two substantial omissions from petitioner's Statement of the Case and two factual inaccuracies repeated throughout petitioner's argument which respondent believes must be brought to this Court's attention.

First, petitioner neglected to mention that the October, 1981, trial at which Clifford Anderson was convicted of two counts of murder was not his first trial on those charges. Rather, Mr. Anderson had been tried by a jury once before on those same charges and had presented a defense of insanity at that trial in September and October of 1981. (R. 649-765) After deliberating two days, the jury in that first trial indicated that it was hopelessly deadlocked, and a mistrial was declared. (R. 1122-23) The error which was the basis of the Illinois Supreme Court's reversal of respondent's convictions at his second trial and which petitioner is requesting this Court to review -- namely, the erroneous introduction of evidence of Mr. Anderson's assertion of his constitutional rights in response to Miranda warnings as substantive evidence of his sanity and thus of his guilt -- occurred at both of Mr. Anderson's trials. (R. 766-81, 783-827, 1745-61, 1840-44, 1878-79, 1952)

A second omission by petitioner concerns what constituted the bulk of the Illinois Supreme Court's opinion in this case. In reviewing Clifford Anderson's convictions and remanding the cause for a new trial, the state supreme court noted that it needed to address only two of the 35 issues raised by Mr. Anderson in his appeal. People v. Anderson, 113 Ill. 2d 1, 5 (1986). After holding that Mr. Anderson was denied a fair trial by the admission of his responses to Miranda warnings as evidence of his sanity and by prosecutorial argument thereon (113 Ill. 2d at 5-7), the state supreme court devoted the majority of its opinion to another serious error under Illinois evidentiary rules that occurred at Mr. Anderson's trial: the trial court's refusal to allow the defense psychiatric expert witness to

testify about the contents of others' reports and records, and about statements made to him by Mr. Anderson during his examination of Mr. Anderson, upon which the expert relied in making his diagnosis that Mr. Anderson was legally insane at the time of the shootings. See 113 Ill. 2d at 7-13.

In addition to those two omissions, petitioner's argument repeatedly states two factual inaccuracies. First, petitioner claims time and again that Mr. Anderson's responses to the Miranda warnings were properly obtained in an "absolute model" application of the decision in Miranda v. Arizona, 384 U.S. 436 (1966), and that the "defendant has never contended otherwise." (Petition at 15, 16, 25, 26) To the contrary, however, the third issue in the appellate brief filed by Mr. Anderson in the Illinois Supreme Court argued that the admission as substantive evidence of sanity of Mr. Anderson's responses to the Miranda warnings given to him by Assistant State's Attorney Melber and the prosecutors' argument thereon constituted reversible error under Edwards v. Arizona, 451 U.S. 477 (1981), and Miranda v. Arizona, 384 U.S. 436 (1966), because Melber had reinitiated interrogation after Mr. Anderson had already asserted his right to counsel upon initially being given Miranda warnings three hours earlier, without counsel having been provided to Mr. Anderson in the interim. (Defendant's Brief at 87-93) The Edwards argument was presented by Mr. Anderson to the state supreme court as an alternative, in part, if the court failed to grant relief under the theory upon which Mr. Anderson ultimately prevailed. (Defendant's Brief at 88, footnote) Because of its disposition of that issue and its grant of a new trial to Mr. Anderson, the state supreme court determined that it need not address the Edwards issue, which was concerned with most of the same improperly admitted evidence and prosecutorial argument.

Finally, despite petitioner's frequent references to and suggestions of a "fraudulent" or "fabricated" claim or defense of insanity by respondent (Petition at 12, 14, 15, 16, 21-22), there was utterly no evidence presented and no psychiatric expert testified at respondent's trials that respondent was feigning insanity or malingering or

fabricating a fraudulent defense. Rather, all psychiatric expert witnesses for both the State and the defense agreed that Mr. Anderson was suffering at the time of the shootings from some form or degree of mental illness involving strong paranoid features or tendencies or psychosis; the only disagreement between the State and defense psychiatric experts was whether or not Mr. Anderson's paranoid disorder or disease constituted legal insanity under Illinois' statutory definition. See Ill. Rev. Stat. (1981), ch. 38, sec. 6-2(a). (R. 1656-57, 1664-66, 1681, 1792-95, 1797-1805, 1810-11, 1833-34, 1864)

REASONS FOR DENYING THE WRIT

I.

SINCE RESPONDENT'S CASE IS ON ALL FOURS WITH WAINWRIGHT V. GREENFIELD, THE ILLINOIS SUPREME COURT'S APPLICATION OF THE HOLDING OF GREENFIELD TO THE FACTS OF THIS CASE WAS CLEARLY CORRECT AND PROVIDES NO REASON FOR THIS COURT TO REVIEW ITS DECISION.

Petitioner requests this Court to grant a writ of certiorari to review a case which is factually on all fours with this Court's recent decision in Wainwright v. Greenfield, 474 U.S. ___, 88 L. Ed. 2d 623, 106 S. Ct. 634 (1986). In effect, petitioner simply wants to relitigate a decision by this Court which is only a few months old. Since the only substantive difference between Clifford Anderson's case and Greenfield is that Mr. Anderson's counsel vigorously and consistently objected over the course of Mr. Anderson's two trials to the improper admission into evidence of his responses to Miranda warnings and to the trial court's improper instructions to the jury about that evidence and to the prosecutors' arguments about that improper evidence whereas no objection was made to the initial introduction of the evidence by Greenfield's counsel, Mr. Anderson's issue was even stronger than Greenfield's and there is thus no ground warranting a grant of certiorari in respondent's case.

In Greenfield this Court held that, just as in Doyle v. Ohio, 426 U.S. 610 (1976), it was fundamentally unfair for the prosecution to use the defendants' postarrest, post-Miranda warnings silence to impeach their trial testimony, so too it was fundmentally unfair for the prosecution in Greenfield to use the defendant's postarrest, post-Miranda warnings silence as evidence of his sanity. 474 U.S. at ___, 88 L. Ed. 2d at 630-32. In reaching that conclusion, this Court thoroughly rejected arguments by the prosecution that Doyle did not control that case because proof of sanity is significantly different from proof of guilt -- that is, the commission of the underlying offense --, because comprehension of Miranda warnings is probative of sanity, and because the State has a vital interest in being able to present evidence of a defendant's sanity at the time of the offense in

order to sustain its burden of proof in regard to an insanity defense. 474 U.S. at ___, 88 L. Ed. 2d at 630-32. Those totally rejected arguments are the same ones which petitioner in the instant cause now reasserts on the same rejected grounds. (Petition at 11-16) Since petitioner has given this Court no reason to reconsider those arguments, they provide no basis for a grant of certiorari.

The only distinction between the instant case and Greenfield which is suggested by petitioner is that evidence of the defendant's post-Miranda warnings silence in Greenfield was introduced during the State's case in chief, while evidence of Mr. Anderson's post-Miranda warnings silence was introduced during the State's case in rebuttal, after Mr. Anderson had presented his defense of insanity through lay and psychiatric expert witnesses. (Petition at 13-15) However, that alleged "distinction" is a distinction without a difference. In both Greenfield's and respondent's trials, the improper evidence of the defendants' post-Miranda warnings silence was admitted as substantive evidence of their sanity and thus of their guilt since the defendant's mental condition at the time of the offense was the guilt-or-innocence issue in each case. As the Eleventh Circuit Court of Appeals noted in Greenfield v. Wainwright, 741 F.2d 329, 336 (11th Cir. 1984), "unlike in Doyle, [defendant] did not take the stand. Any use of his silence was as substantive evidence against him, a use that even the Doyle dissenters would have decried." See id. at 332 n.5; Doyle v. Ohio, 426 U.S. at 628.

Petitioner's further argument in this regard that a defendant should not be allowed to "fabricate" an insanity defense or present a "fraudulent" claim of insanity and then hide behind the Fifth Amendment was similarly already answered specifically by the Eleventh Circuit in Greenfield and implicitly by this Courtin Greenfield. See 88 L. Ed. 2d at 630 & n.8. The Eleventh Circuit's observation applies equally to the facts of the respondent's case: "This case cannot fall under the exception of a defendant using the fifth amendment as a shield for perjury because the defendant never took the stand. His experts likewise did not place his conduct at the time of his arrest

directly in issue in the opinions they expressed." 741 F.2d at 336. Moreover, as respondent explained above in the Statement of the Case, there was utterly no evidence or even suggestion at respondent's trials that he was feigning insanity or malingering or presenting a fraudulent defense. Instead, all psychiatric experts for the State and the defense agreed that respondent was afflicted with some form or degree of mental illness involving paranoia at the time of the shootings. Consequently, there is simply no distinction between the improper admission as substantive evidence of the defendant's sanity and thus of his guilt of his post-Miranda warnings silence in the State's case in chief in Greenfield and its admission as substantive evidence of Clifford Anderson's sanity and thus of his guilt in the State's case in rebuttal in the instant cause.

In summary, the Illinois Supreme Court properly applied the holding of Greenfield to the instant cause, which is factually on all fours with Greenfield. Since petitioner has provided no reason why Greenfield should be relitigated and thus why certiorari should be granted, respondent respectfully requests this Court to deny the petition for a writ of certiorari.

II.

THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT ADMISSION OF CLIFFORD ANDERSON'S POST-MIRANDA WARNINGS SILENCE AS SUBSTANTIVE EVIDENCE OF HIS GUILT AND PROSECUTORIAL ARGUMENT THEREON WAS NOT HARMLESS ERROR. INDEED, UNDER ANY HARMLESS ERROR STANDARD, SUCH ERROR WAS NOT HARMLESS.

Petitioner requests this Court to grant certiorari to review the purely factual question, which was thoroughly and properly addressed by the Supreme Court of Illinois, as to whether the admission of respondent's post-Miranda warnings silence on two separate occasions as substantive evidence of his sanity and thus of his guilt, along with two improper admonishments by the trial court to the jury regarding that evidence which served only to highlight the impropriety as well as improper prosecutorial comments on that evidence in both the State's opening and rebuttal closing arguments, constituted harmless error. Petitioner also suggests that this Court, in reviewing that question, apply a more relaxed harmless error standard, from petitioner's viewpoint, which petitioner never asked the Supreme Court of Illinois to apply. (Petitioner at 22-23) Since the harmless error question in respondent's case is of no general importance, since the Illinois Supreme Court properly and thoroughly analyzed and determined the question of harmless error, since petitioner has lost any right to request that a different, more relaxed standard be applied, and since the constitutional error in respondent's case could not be harmless under any suggested standard, no ground has been presented which warrants a grant of certiorari in respondent's case.

Petitioner argues first that this Court should review the state supreme court's determination that the Doyle - Greenfield violation was not harmless error "given the sharp disagreement of the expert witnesses on the question" of respondent's sanity. People v. Anderson, 113 Ill. 2d 1, 7 (1986). According to petitioner, the state supreme court "ignored considerable lay evidence" of respondent's sanity, which petitioner purportedly then sets forth in its argument. (Petition at 18-20) It is noteworthy that petitioner has therefore conceded the closely balanced nature of the psychiatric expert

testimony, which, as respondent set forth above in the Statement of the Case, differed only as to the degree of respondent's paranoid mental illness. Equally closely balanced was the lay evidence of respondent's insanity. Two witnesses -- one a State's witness, the other a defense witness -- presented lay opinions that Clifford Anderson's conduct and state of mind at the time of the shooting were abnormal (R. 1425, 1582), whereas a police officer was the sole witness who testified that Mr. Anderson appeared to be normal. (R. 1464-65) Mr. Anderson's roommate described his paranoid delusions over the course of several months about the building in which he lived and worked and his "crazy" state of mind just before the shootings. (R. 1572-82) Mr. Anderson's sister testified to a history a severe mental illness in the Anderson family. (R. 1601-16)

In light of the extensive lay and expert opinion establishing Mr. Anderson's insanity at the time of the shootings, the evidence at worst was closely balanced. Since there is no question of the existence of a reasonable possibility that the improper admission of respondent's post-Miranda warnings silence on two separate occasions as substantive evidence of his sanity and his guilt, along with improper admonitions to the jury by the trial court over defense objection highlighting that impropriety (R. 1758-61, 1844) and emphasized by improper comments by the prosecutors on that evidence in both their initial and rebuttal closing arguments (R. 1878-79, 1952), may have contributed to Clifford Anderson's convictions, (see Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)), the Illinois Supreme Court correctly decided this factual question that the error was not harmless, and petitioner thus has presented no reason for this Court to review that determination.

Petitioner also claims that the error was harmless because it supposedly only affected a prong of the Illinois statutory insanity defense on which respondent allegedly did not rely. (Petition at 20-21) However, the Illinois Supreme Court properly answered that argument in its decision below:

> The prosecution explicitly told the jury that the evidence established the defendant's sanity under both prongs of the insanity defense, and this argument was consistent with the judge's admonitions. The State cannot now maintain that the jury ignored the advice and disregarded the evidence. 113 Ill. 2d at 6.

In any event, such a purely factual question revolving around Illinois' statutory definition of insanity (see Ill. Rev. Stat. (1981), ch. 38, sec. 6-2(a)) is not an issue of general importance meriting this Court's attention.

Finally, petitioner suggests that the less stringent harmless error standard of Donnelly v. DeChristoforo, 416 U.S. 637 (1974), should be applied to violations of Greenfield. (Petition at 22-23) The Illinois Supreme Court has applied the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967), to violations of Doyle v. Ohio and thus implicitly applied the Chapman standard in the instant cause. See, e.g., People v. Miller, 96 Ill. 2d 385, 395-96, 450 N.E.2d 322 (1983). Indeed, the Chapman standard was not only the harmless error standard under which Mr. Anderson analyzed the question in his appellate brief in the state supreme court (Defendant's Brief at 84-87) but the Chapman standard was also the harmless error standard which petitioner in its appellate brief urged the Illinois Supreme Court to apply to the Greenfield issue. (State's Brief at 65-68) Petitioner thus has lost any right to request that a different, less stringent standard now be applied by this Court to the Greenfield violation in this case. See Steagald v. United States, 451 U.S. 204, 211 (1981). For that reason also, this Court should deny certiorari.

In any event, no matter what harmless error standard is applied to the Greenfield violation in respondent's case, that constitutional error was not harmless. Where the evidence of respondent's sanity was so closely balanced, it can clearly be concluded that, absent the improperly admitted evidence and admonitions by the trial court and arguments by the prosecutors on that evidence, the result of Mr. Anderson's trial would have been different, for he would have been

found not guilty by reason of insanity. Indeed, the fact that his first trial, at which the same Greenfield errors occurred, resulted in a hung jury is further evidence that the result of a fundamentally fair trial will be different.

Accordingly, in light of all the foregoing reasons, there is no basis for this Court to review this case. Respondent respectfully requests that the petition for certiorari be denied.

III.

SINCE GREENFIELD WAS SIMPLY AN APPLICATION OF THE WELL-SETTLED PRINCIPLES OF DOYLE V. OHIO, AND SINCE RESPONDENT'S CASE WAS NOT FINAL AT THE TIME OF THE GREENFIELD DECISION, GREENFIELD CLEARLY APPLIED TO RESPONDENT'S CASE AND THERE IS THUS NO REASON FOR THIS COURT TO REVIEW THE DECISION BELOW.

Petitioner asks this Court to grant certiorari in this case in order to use it as a vehicle to hold that this Court's decision in Wainwright v. Greenfield, 474 U.S. ___, 88 L. Ed. 2d 623, 106 S. Ct. 634 (1986), is not to be applied retroactively to cases pending on direct appeal in the state court system at the time of the Greenfield decision. However, since the rule of Greenfield was not a clear break with past precedents but instead simply an application of the well-settled principles of Doyle v. Ohio, 426 U.S. 610 (1976), Greenfield undoubtedly must be applied to cases pending on direct review in the state courts at the time of its decision. See Shea v. Louisiana, 470 U.S. 50 (1985); United States v. Johnson, 457 U.S. 537 (1982). Since respondent's case was pending on direct review in the Supreme Court of Illinois at the time of the Greenfield decision, petitioner has presented no reason for this Court to grant certiorari in this case.

Contrary to petitioner's claim that Greenfield was "a clear break with prior precedent" (Petition at 24), Greenfield set forth no new substantive or procedural rule but simply reaffirmed the rule announced in Doyle v. Ohio in 1976 and applied it to another factual situation. The Illinois Supreme court recognized that fact when, a month prior to its decision in the instant cause, it held in People v. Stack, 112 Ill. 2d 301, 493 N.E.2d 339 (1986), that Greenfield "merely fleshes out the Doyle rule" and applies settled precedent to a new fact situation in order to avoid a fundamentally unfair trial and thus is fully retroactive. 112 Ill. 2d at 307-09. In reaching that conclusion, the state supreme court cited this Court's reasoning in Greenfield itself:

> "'The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach

> that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.' (Emphasis added.) Wainwright v. Greenfield (1986), 474 U.S. ___, ___, 106 S. Ct. 634, 639, 88 L. Ed. 2d 623, 630-31." People v. Stack, 112 Ill. 2d at 307-08.

Since Greenfield, according to this Court's own reasoning, is merely an application and not an extension of Doyle, this Court's retroactivity analysis in United States v. Johnson is equally applicable here:

> [W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way. 457 U.S. at 549.

Since Greenfield has not altered the rule of Doyle in any material way, it has been a foregone conclusion that Greenfield's rule applies to earlier cases. At the very least, as the Illinois Supreme Court has held, Greenfield must be applied retroactively to all convictions not yet final at the time that decision was rendered. See Shea v. Louisiana; United States v. Johnson, 457 U.S. at 562; Linkletter v. Walker, 381 U.S. 618, 627 (1975).

In choosing to analyze its retroactivity issue under the three criteria set forth by this Court in Stovall v. Denno, 388 U.S. 293, 297 (1967), petitioner claims that each factor militates against retroactive application of Greenfield. (Petition at 24) Petitioner has ignored a severe problem with its argument under each factor. First, petitioner argues once again that the issue in this case is "the admissibility of evidence which was properly obtained" through an "absolute model" application of Miranda and that "defendant has never

contended otherwise." (Petition at 25-26) To the contrary, however, as explained more thoroughly above in respondent's Statement of the Case, much of that evidence was improperly obtained through a violation of respondent's rights under Edwards v. Arizona, 451 U.S. 477 (1981), and Miranda v. Arizona, 384 U.S. 436 (1966), when respondent was reinterrogated by an assistant state's attorney after he had previously requested counsel following the Miranda warnings but had not been provided with counsel. Because of the Illinois Supreme Court's disposition of the Greenfield issue and its grant of a new trial to respondent, the court determined that it need not address the Edwards issue, which was concerned with most of the same improperly admitted evidence and prosecutorial argument and which was the third issue in Mr. Anderson's brief in the Illinois Supreme Court. (Defendant's Brief at 87-93)

Secondly, petitioner claims that the trial court's ruling on the admissibility of respondent's post-Miranda warnings silence was properly based on two cases which petitioner claims were the "only apparent authority" at the time of respondent's trial. (Petition at 26-27) However, the authority in effect at the time of Mr. Anderson's trial was Doyle v. Ohio. Any lower court authority to the contrary was simply wrong, as Greenfield now makes apparent. "Unjustified 'reliance' is no bar to retroactivity." Solem v. Stumes, 465 U.S. 638, 646 (1984).

As to the final criterion, petitioner concedes that, "[i]n contrast to the many cases likely affected by retroactive application of Edwards v. Arizona . . ., there are probably less (sic) cases in which a defendant's conduct during recitation of the Miranda warnings has been used to rebut the defense of insanity." (Petition at 27) Since Edwards was applied retroactively by this Court to cases pending on direct review when Edwards was decided (Shea v. Louisiana, 470 U.S. 50 (1985)), so too then should Greenfield be applied retroactively at least to cases pending on direct review at the time of that decision, as respondent's case was. As to petitioner's concern about the retrial of Mr. Anderson after the passage of so many years (Petition

at 27-28), Mr. Anderson will nonetheless be receiving a new trial because of the other severe error committed at his second trial, as set forth more thoroughly above in respondent's Statement of the Case.

In summary, Greenfield neither addressed anything left open by Doyle, nor announced an unanticipated principle which constituted a clear break with the past, nor overruled a past precedent, nor disapproved a practice arguably sanctioned in prior cases, nor overturned a longstanding and widespread practice supported by a near-unanimous body of lower court authority. See United States v. Johnson, 457 U.S. at 551. Greenfield is therefore fully applicable to Clifford Anderson's case. Accordingly, petitioner has provided no reason for this Court to grant certiorari in this case.

CONCLUSION

For all the foregoing reasons, respondent Clifford Anderson respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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